IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 26, 2008 Session

STATE OF TENNESSEE v. MICHAEL FINNELL

Direct Appeal from the Circuit Court for Bledsoe County
No. 53-2005 J. Curtis Smith, Judge

No. E2007-01294-CCA-R3-HC - Filed March 28, 2008

In 1996, the Petitioner, Michael Finnell, pled guilty to two counts of aggravated rape and one count of aggravated burglary. For the aggravated rape convictions, the trial court imposed concurrent twenty-three year sentences, to be served at eighty-five percent. For the aggravated burglary conviction, the trial court imposed a five year sentence to be run at thirty percent, consecutive to the aggravated rape convictions. The Petitioner filed a petition for habeas corpus relief claiming the judgments were void because his two aggravated rape convictions should have statutorily been served at one-hundred percent. The habeas court agreed and granted relief as to the sentence. The Petitioner now appeals complaining that the eighty-five percent service was a "bargained-for" provision of his guilty plea, and, thus, his guilty pleas should also be set aside. After a thorough review of the record and applicable law, we affirm the judgment of the habeas court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Robert G. Morgan, Jasper, Tennessee, for the Appellant, Michael Finnell.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; J. Michael Taylor, District Attorney General; James W. Pope, III, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

At the habeas court, the following evidence was presented: the Petitioner pled guilty to two counts of aggravated rape and one count of aggravated burglary. On the aggravated rape judgments, the trial court wrote, "Sentence shall be served at a minimum of at least 85 percent before the defendant may be considered for release alternatives." The Petitioner argued that the release

eligibility date was in direct contravention of Tennessee Code Annotated section 39-13-523, which requires multiple sexual offense sentences to be served day-for-day, and, thus, the judgments were void. The parties entered into evidence the Petitioner's petition to enter plea of guilty, which states the total sentences to which the Petitioner pled – twenty-three years on each aggravated rape and five years on the aggravated burglary – but does not mention release eligibility, the judgments, and the transcript from the guilty plea hearing.

Upon a review of the evidence before it, the habeas court found that the sentence was void as a matter of law because the eighty-five percent release eligibility was in direct contravention of a statute. *See* T.C.A. § 39-13-523 (Supp. 1996). The habeas court found, however, that the release eligibility date was not "bargained-for" because the petition to enter plea of guilty mentions nothing of the release eligibility date. Because the release eligibility date was not "bargained-for," the underlying guilty plea was not reliant on the sentence, and therefore not also void. The court described its view of the situation as follows:

> It appears that the parties merely negotiated the offenses to be pleaded and the number of years to be served. This is the case in most pleas. Release eligibility is not discussed in plea negotiations because the proper release eligibility is mandated by statute. It is only when a hybrid sentence is being negotiated that the release eligibility is discussed. There is no evidence in the record to suggest that the parties were seeking to enter a hybrid sentence. Additional terms that were not negotiated, but were part of the judgments, include sentencing pursuant to the Sentence Reform Act of 1989, sentencing to the department of correction and declaring the petitioner infamous. The provisions are likewise mandated by operation of law. The prosecutor's statement to the court regarding release eligibility was not the result of plea-bargaining, but rather due to the unwitting error of the prosecutor as to what release eligibility applied. This is the same mistake made by the trial judge in the *Smith* case. The error is confirmed by the prosecutor's reference to T.C.A. § 40-35-501, which does not list aggravated rape in section (i)(2)(F). Had there been an agreement by the parties to forego sentencing the petitioner as a multiple rapist pursuant to T.C.A. Section 39-13-523, the parties would have so indicated in the plea documents and announced the same to the court.

It is from this decision that the Petitioner now appeals.

II. Analysis

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. *See Faulkner v. State*, 226 S.W.3d 358, 361 (Tenn. 2007). Although the right is guaranteed in the Tennessee Constitution, the right is governed by statute. T.C.A. § 29-21-101 (2006) *et seq*. The determination of whether habeas corpus relief should be granted is a question of law and is accordingly given de novo review. *Smith v. Lewis*, 202 S.W.3d 124, 127 (Tenn. 2006); *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000). Although there is no statutory limit preventing a habeas corpus

petition, the grounds upon which relief can be granted are very narrow. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). It is the burden of the petitioner to demonstrate by a preponderance of the evidence that "the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000). In other words, the very narrow grounds upon which a habeas corpus petition can be based are as follows: (1) a claim there was a void judgment which was facially invalid because the convicting court was without jurisdiction or authority to sentence the defendant; or (2) a claim the defendant's sentence has expired. *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000); *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993). "An illegal sentence, one whose imposition directly contravenes a statute, is considered void and may be set aside at any time." *May v. Carlton*, — S.W.3d —, 2008 WL 160695, at *3 (Tenn. 2008) (citing *State v. Burkhard*, 566 S.W.2d 871, 873 (Tenn. 1978)). In contrast, a voidable judgment is "one that is facially valid and requires the introduction of proof beyond the face of the record or judgment to establish its invalidity." *Taylor*, 995 S.W.2d at 83; *see State v. Richie*, 20 S.W.3d 624, 633 (Tenn. 2000).

Of particular interest in this case are the Tennessee Supreme Court cases of *Smith v. Lewis*, 202 S.W.3d 124 (Tenn. 2006) and *Summers v. State*, 212 S.W.3d 251 (Tenn. 2007). Those cases addressed the question of whether errors in sentencing require the underlying conviction to be vacated pursuant to *McLaney v. Bell*, 59 S.W.2d 90 (Tenn. 2001), *overruled on other grounds by Summers*, 212 S.W.3d at 261-62. In *Smith*, the petitioner pled guilty to rape of a child, and the written plea agreement indicated an agreed sentence of "15 yrs Range I." 202 S.W.3d at 126. Further, the prosecutor stated that Smith would "plead to the count of child rape and will receive 15 years to serve." *Id*. The trial court questioned Smith on the matter, and he acknowledged that he would be required to serve eighty-five percent of his sentence before he would be eligible for parole. *Id*. After initially entering a judgment stating Smith would be eligible for parole after serving thirty percent of his sentence, the trial court entered an amended judgment reforming the release eligibility to eighty-five percent. *Id*. Smith complained, much like the Petitioner here, that the statute in effect at the time required one-hundred percent service of his sentence; thus, Smith requested habeas corpus relief. *Id*. at 126-27; *see* T.C.A. §§ 39-13-523(b), 40-35-501 (Supp. 1996). The Court concluded that Smith's sentence was illegal and void, 202 S.W.3d at 128, but the Court concluded that, "the record in this case does not demonstrate on its face that the illegal provision of early release eligibility was a bargained-for element of Smith's plea." *Id*. at 130. Thus, the sentence was vacated, but the conviction remained intact.

In *Summers*, the Petitioner pled guilty to voluntary manslaughter, aggravated arson, and sale of cocaine for an effective sentence of forty years. 212 S.W.3d at 255. Summers also pled guilty to misdemeanor escape and agreed to a sentence of eleven months, twenty-nine days, to be served concurrently with the felony sentences. *Id*. Thirteen years into his sentence, Summers filed his habeas petition alleging the trial court erred in sentencing him because he was being held on the three felony charges when he escaped, thus mandating consecutive sentences. *Id*. at 255-56; *see* T.C.A. § 39-16-605(c) (2006); Tenn. R. Crim. P. 32(c)(3). The Court affirmed its holding in *Smith* and clarified that "the determinative issue is whether the plea agreement included an illegal sentence as a material element. If so, the illegal sentence renders the guilty plea, including the conviction, invalid." 212 S.W.3d at 259 (citing *McConnell v. State*, 12 S.W.3d 795, 800 n.9 (Tenn. 2000)). The

Court ultimately held that Summers had not proven he was being held on the felony charges when he escaped; thus, his habeas petition was properly denied. *Id*. at 262.

These two cases emphasize that we are to consider whether the eighty-five percent release eligibility date in this case was a "bargained-for" provision or a "material element." We must examine the record, which in this case includes the plea hearing, the agreement to enter guilty plea, and the judgments, to make this determination. If the record supports the argument that the eighty-five percent release eligibility was "bargained-for" or a "material element" of the guilty plea, then the underlying guilty plea must be vacated along with the sentence.

The Petitioner's aggravated rape judgments state that the "[s]entence shall be served at a minimum of at least 85% before the defendant may be considered for release alternatives." Further, a notation was written on both aggravated rape judgments: "85% T.C.A. § 40-35-501(7)(i)(1)."[1] Nothing in the judgments indicates that the release eligibility was "bargained-for" or a "material element." Next, the "Petition to Enter Plea of Guilty" clearly sets out the offenses and the "Agreement as to Sentence." The following is listed in that document:

Docket #	Offense	Agreement as to Sentence
[] 5207501	Aggravated Rape	23 years
[] 5207502	" "	23 years
[] 5207503	Aggravated Burglary	5 years consecutive to [] 5207501 - [] 5207502 Sentence to be consecutive to Georgia sentence

Similarly, nothing in the agreement indicates that the release eligibility was "bargained-for" or a material element.

Finally, at the Petitioner's guilty plea hearing, the State told the trial court that it "recommended" sentences of twenty-three years on each aggravated rape count, run concurrently, "to be served at a minimum of eighty-five percent before the defendant is eligible for parole pursuant to T.C.A. § 40-35-501." The Petitioner's attorney stated that "he [pled] guilty because he has acknowledged he is guilty from the very beginning . . . ." The court stated that it would "accept the State's recommendation to a sentence of aggravated rape of twenty-three years to be served at eighty-five percent and this sentence will be served consecutive to the Georgia sentence in Gwinnett County."

Although the release eligibility is mentioned in the sentencing hearing, it is as a "recommendation" from the State. In total, we conclude that the Petitioner has not proven that the release eligibility was "bargained-for" or a "material element" of his agreement with the State. The

[1]The notation is apparently referring to Tennessee Code Annotated section 40-35-501(i)(1), as there is no subsection (7) in this statute.

judgments note the release eligibility but provide no support for the argument that the number was "bargained-for." Similarly, the prosecutor recommended the release eligibility, but we have no statement explaining that the parties ever discussed or negotiated the issue. As the habeas court similarly found, it appears that the prosecutor misstated or misunderstood the law on the matter, and he believed the law required the sentence to be served at eighty-five percent. *See Smith*, 202 S.W.3d at 127-28 (discussing ambiguity of the statutes in issue). We agree with the State that the most telling document is the actual written plea agreement, which does not mention the release eligibility but does mention whether the sentences would be run consecutively or concurrently. Because the Petitioner has not carried his burden of proof, we conclude the trial court did not err in determining the habeas petition should be denied as to the guilty plea.

III. Conclusion

Based on the foregoing reasoning and authority, we conclude that the Petitioner has not proven that the release eligibility was "bargained-for" or a "material element" of the guilty plea. As such, the judgment of the habeas court is affirmed.

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ROBERT W. WEDEMEYER, JUDGE